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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 896

FRANK PATZKE, JR.,
Petitioner,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO.,
a Virginia Corporation,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

(Figures in parentheses refer to pages of the joint and supplemental appendices used in the court below, nine copies of which are filed herewith. Unless otherwise indicated italics are supplied.)

Frank Patzke, Jr., your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above cause on December 3, 1962.

OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Clair, Michigan, is printed as Appendix A, *infra*, and is unreported.

The opinion of the Supreme Court for the State of Michigan is printed as Appendix B, *infra*, and is reported at 368 Mich 190.

JURISDICTION

The judgment of the Supreme Court for the State of Michigan, granting respondent railroad a new trial was dated and entered on December 3, 1962 (Appendix D, *infra*).

The jurisdiction of this court is invoked under 28 USC §1257 (3).

QUESTIONS PRESENTED

I

Does the defendant, in an FELA case who pleads, as an affirmative defense, introduces as a defense exhibit, and relies upon an injured employee's release as a "good and *valid* bar" to plaintiff's case, have the burden of establishing the validity of such release?

II

Can a FELA defendant first object to a jury instruction after verdict and discharge of the jury?

III

Was the release void as a matter of law?

IV

Did the setting aside of the verdict and judgment because the trial judge disagreed with the jury's determinations of fact constitute a violation of the Seventh Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved in this case are found in Appendix E. They are:

The Seventh Amendment to the Constitution of the United States.

45 USC §11
45 USC §51
45 USC §55
45 USC §56

A. The basic facts.

In April, 1957, a jury in the Circuit Court for the County of St. Clair, Michigan, awarded damages to the petitioner in this action under the Federal Employers Liability Act for personal injuries resulting from a defective hand brake on respondent's lines (45 USC §§11 and 51 *et seq.*). In July, 1957, respondent's motions for a directed verdict and judgment notwithstanding the verdict were denied and a judgment for petitioner was entered upon the verdict of the jury. In June, 1958, the Circuit Court set aside the

verdict and judgment and granted a new trial upon the presently relevant ground that the court had erred in instructing the jury that respondent had the burden of establishing the validity of the release pleaded by way of affirmative defense as a good and *valid* bar to plaintiff's action. Many other grounds of error were urged by respondent for setting aside the verdict and judgment. The Circuit Court set aside the verdict and judgment and granted a new trial for all of the grounds so urged plus its finding that the verdict of the jury resulted in a miscarriage of justice. The Supreme Court of Michigan affirmed upon the sole ground that the Circuit Court erred in instructing the jury that the burden of establishing validity of the release was upon the respondent.

Respondent first made objection to the jury instruction in question in June, 1957, approximately six weeks after the jury had been discharged (1sb).

Throughout the trial the circuit judge repeatedly commented upon the fact that either petitioner's witnesses or respondent's witnesses were committing perjury and stated that he was going to do something about it at the conclusion of the case. Most such comments were made in the absence of the jury; however, the court did call the perjury to the jury's attention during instructions. After the trial the Circuit Court stated in substance that there was no question of fact in the case except as "manufactured" by perjury, and said that he wanted to have affidavits filed as to the truth and proceed from that basis (possibly toward a perjury prosecution).

Petitioner contends that the real reason for setting aside the verdict and judgment was that the circuit judge disbelieved petitioner's witnesses and believed respondent's witnesses.

After its opinion and judgment of December 3, 1962, the Michigan Supreme Court stayed further proceedings pending filing of this petition.

The question (Question I) whether respondent had the burden of establishing the validity of the release was first raised on June 10, 1957, at a hearing on other motions, when respondent's counsel objected to petitioner's requested jury instruction on the subject. The question was later raised by respondent's motion for new trial. The trial court took no action on June 10, 1957, but granted the motion for new trial on June 2, 1958, upon this and other grounds. The Michigan Supreme Court upheld the action of the trial court on this ground alone.

Question II was raised and decided in the trial and in the appellate court as stated in the previous paragraph.

Question III (invalidity of release as a matter of law) was first raised when petitioner presented his proposed jury instruction on the subject. The trial court refused to grant such instruction. The question was again raised by petitioner in his brief in the Michigan Supreme Court. The Michigan Supreme Court ruled against petitioner on this question by affirming the granting of a new trial.

Question IV arose after the trial when the trial court granted respondent's motion for a new trial. It was briefed and argued in the trial court, and also in the State Supreme Court. In both courts it was decided against petitioner.

BASIS OF FEDERAL JURISDICTION

Provision is made in 45 USC 56 that the jurisdiction of the Courts of the United States shall be concurrent with that of the courts of the several states over actions brought

under the Federal Employers' Liability Act. Jurisdiction of the Circuit Court for St. Clair County, Michigan, was originally invoked under 45 USC §§11, 51 and 56:

REASONS FOR GRANTING THE WRIT

A. The Michigan Supreme Court has decided an important federal question which has not been determined by this court. This is, that despite the fact that the release was pleaded by respondent as an affirmative defense and was alleged to be a "good and *valid*" release of all of petitioner's claims, and was introduced in evidence by defendant, nevertheless petitioner had the burden of establishing that the release was *invalid*.

B. The Michigan Supreme Court has decided federal questions of substance in a way probably not in accord with applicable decisions of this Court. These are (Question II) that respondent's objection to the jury instruction on burden of establishing invalidity of the release was sufficient although not made until six weeks after verdict and discharge of the jury; that the release was not void as a matter of law although the consideration for it was 75% of petitioner's lost wages; and that the setting aside of the verdict and judgment was proper although based on the trial court's disbelief of petitioner's witnesses.

ARGUMENT

A. In this case plaintiff declared against the defendant railroad under the Federal Safety Appliance Act (45 USC §11) and the Federal Employers' Liability Act (45 USC §51, *et seq.*) claiming that defendant negligently failed to provide plaintiff with a safe place in which to work and failed to provide him with a safe appliance to operate. In its answer to plaintiff's declaration, the defendant included an affirmative defense, prefacing such defense with:

> "In addtion to the denials and defenses set forth above, (defendant will) give in evidence and insist in its defense as follows."

Paragraph one of the affirmative defense reads as follows:

> "That plaintiff herein has executed a good and *valid* release of any claims he has or may have arising out of the accident which plaintiff alleges herein, a copy of said release being attached hereto and which is hereby made a part hereof, and that said release is a good and valid bar to any recovery in this action."

The burden of proving the release valid was on the defendant which introduced the issue of validity of the release into the case first by pleading and subsequently by the use of said release at trial as its exhibit 3. At trial below plaintiff's counsel requested, and the trial court granted, instruction that the defendant had the burden of proving the validity of the release according to its affirmatively pleaded contentions regarding it. No issue was made of this request (defendant not having made request for a contrary instruction) until weeks after the jury had rendered its verdict and had been discharged.

The Michigan Supreme Court held the trial judge was in error in granting this request to charge on grounds that are not too clear. First off, the Michigan Supreme Court discusses Michigan law on this point and then proceeds to acknowledge that federal law applies—further stating that federal law in regard to validity of releases under the Federal Employers' Liability Act "is similar to our State law." *Callen v. Pennsylvania Railroad Co.*, 332 US 625, 92 L ed 242, is cited in the opinion below as is *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 US 359, 96 L ed 398, for the proposition that one who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity.

It is submitted that neither the *Callen* nor the *Dice Case* is controlling on this point.

The question who had the burden of establishing the validity of a release was not an issue in either of these cases. The only reference to burden of proof in the *Dice Case* is found in the dissenting opinion in which four Justices quoted the "burden of showing" language which was dictum in the *Callen Case*. In *Callen*, plaintiff's attorney and *amicus* counsel requested this Court to hold the burden of proving the validity of a release was upon the defendant. This Court refused to do so, stating that railroad releases stood on the same basis as any other releases and that one who attacked them had the burden of showing invalidity. Unfortunately the converse of this rule was not stated, i. e., that one who alleges a valid release as a bar to the plaintiff's case—as an affirmative defense—has the burden of establishing its validity. Railroad counsel in *Callen* considered the "burden of showing" argument irrelevant as appears in its brief in opposition to certiorari filed October 1, 1947, on pages 10 and 11 thereof. Both federal and Michigan court rules require that a release be pleaded as

an affirmative defense (Federal Rules of Civil Procedure 8(c) and old Michigan Court Rule 23, 3). Federal and Michigan practice impose upon the pleader of an affirmative defense the burden of proving such.

The validity of a railroad release is to be decided by the federal common law gathered from the same sources which, before *Erie R. R. Co. v. Tompkins*, 304 US 64, federal courts employed in cases depending upon diversity of citizenship. *Ricketts v. Pennsylvania R. Co.*, 153 F. 2d 757.

That common law was, in substance, that the burden of proving affirmative defenses was on the defendant. For example, in *Wright-Blodgett Co. v. United States*, 236 US 397, a suit brought by the United States to cancel certain land patents, the United States supreme court ruled that *bona fide purchase for value* was an affirmative defense which the defendant was required to establish in order to defeat the government's right to the cancellation (236 US 403). In *Central Vermont R. R. v. White*, 238 US 507, an FELA case, this Court ruled that the question of who had the burden of proving contributory negligence was a matter of substantive right rather than a mere matter of state procedure. In substance this court held that despite the state requirement that plaintiff establish freedom from contributory negligence, the federal common law rule which made contributory negligence an affirmative defense and placed the burden of proving it upon the defendant was to be applied (238 US 512). Other federal cases holding that the burden of proving affirmative defenses is on the defendant include *Rinehart & Dennis Co. v. Childree & Taylor*, 257 F 37, 40 (payment and set off); *Howe v. General Motors Corp.*, 167 FS 330, 336 (laches and estoppel); *Ocean A & G Corp. v. Reubin*, 273 F 2d 157 (exception in

insurance policy); *Gipps Brewing Co. v. Central M. M. Ins. Co.*, 147 F 2d 6 (fraud); *State Farm M. A. Ins. Co. v. Koval*, 146 F 2d 118 (insured's breach of cooperation clause); *National Lead Co. v. Nulsen*, 131 F 2d 51, certiorari denied 318 US 758, *(res judicata)*; *United States v. Goldberg*, 136 FS 34 (agency); *Whitaker & Co. v. City of Carbondale*, 55 FS 72 (invalidity of bonds). [Diversity cases such as *Palmer v. Hoffman*, 318 US 109, and *Cincinnati N. O. & T. P. Ry. Co., v. Eller*, 197 F 2d 642, certiorari denied 344 US 864, holding that the burden of proving an affirmative defense is determined by state law are not in point because they apply the rule of *Erie R. Co. v. Tompkins*, 305 US 64. See *Ricketts* (153 F. 2d 757).]

Some of the above cases were decided according to federal common law prior to the adoption of the present Rules of Civil Procedure, including rule 8 (c). Michigan's court rule 23, §3, requires the special pleading of releases and other affirmative defenses, and places the burden of proving such defenses on the defendant.*

For Michigan cases on this same point see *Residence Fire Ins. Co. v. Hannawald*, 377 Mich 103, 106 (arson); *Eherenbrook v. Webber*, 100 Mich 314, of which more later; *Clark v. Dillman*, 108 Mich 625, 627 (agency); *Moore v. Mutual Reserve Life Association*, 133 Mich 526, 534 (breach of warranty); *Truax v. Heartt*, 135 Mich 150 (recoupment); *Wallace v. Detroit, etc. Ry. Co.*, 176 Mich 128, 134 (loss of baggage by lightening); *Connor v. McRae*, 193 Mich 682, 693-695 (casual and involuntary trespass); *Meeuwsen v. Clough & Warren Co.*, 207 Mich 697, 700-701 (condition precedent to effectiveness of contract);

*This Court, as well as the State Courts, recognizes exceptions to the general rule. That these state and federal exceptions are identical will be shown later herein.

Hamburger v. Bank of Detroit, 218 Mich 173, 176 (acceptance of another as debtor); *Peck Iron and Steel Works v. Boomerschein*, 221 Mich 171, 175 (fraud); *Munroe v. Pere Marquette Ry. Co.*, 226 Mich 158, 160 (adverse possession); *Willard v. Shekell*, 236 Mich 197, 205 (election of remedies); *Fink v. Superior Lamp & Shade Co.*, 238 Mich 390, 395, (that certain accounts were house accounts upon which plaintiff was entitled to no commission); *Burke v. City of River Rouge*, 240 Mich 12, 14 (waiver); *Molnar v. Mutual Auto Insurance Co.*, 242 Mich 41, 42 (noncompliance with condition in insurance policy); *Dunn v. Citizens Mutual Fire Ins. Co.*, 251 Mich 71, 73 (arson); *Palmer v. Schrage*, 258 Mich 560, 568-569 (failure to give notice); *Shiovitz v. New York Life Ins. Co.*, 281 Mich 387 (suicide); *In re Dunneback's Estate*, 302 Mich 73, 77 (payment); *Hatch v. Township Unit School*, 310 Mich 516, 533; *Saari v. G. C. Dates & Associates*, 311 Mich 624, 628-629 (breach of contract); *Brown v. Sellars*, 312 Mich 313, 325 (satisfaction); *In re McKenes' Estate*, 315 Mich 369, 381 (statute of limitations); *Obrenski v. Dworzanin*, 322 Mich 285, 290 (cancellation or accord and satisfaction); *Malcolm MacDonell & Associates, Inc. v. Bank*, 325 Mich 591, 598, (justification for breach of contract); *Redding v. Snyder*, 352 Mich 241, 247-248 (estoppel and waiver). Respondent cited only one Michigan case which was in point and to the contrary. That was *Porth v. Cadillac Motor Car Co.*, 198 Mich 501, holding that the burden of establishing fraud in connection with a release was upon the plaintiff. This case is contrary to the great weight of Michigan authority and the holding of Michigan in *Cottrell v. United Traction Co.*, 184 Mich 221, wherein it was ruled that the burden was on the defendant to show that the release applied to the employment in which deceased was engaged at the time of his death.

As will be noted some of the above stated Michigan decisions ante-dated any court rule on the pleading of affirmative defenses or (in general issue days) special defenses.

The above stated state and federal holdings are in accord with the general rule as stated in *31 CJS* 714, Evidence §104:

> "The burden is on defendant to prove matter in avoidance, special or affirmative defenses, and other new matter pleaded by him as ground for denying the plaintiff relief."

To the Michigan and federal rule that the burden of establishing an affirmative defense is on the defendant there is the well-known exception that a party who would not otherwise have the burden of proof may acquire it by contentions made in the pleadings, claims orally stated during or prior to the trial as well as by the course of the trial itself. Thus in *American Ry. Express Co. v. Ready*, 232 Mich 624, plaintiff had pleaded *nonpayment* in a suit for the price of goods delivered. Defendant made a simple denial. *Payment* was an affirmative defense which was not pleaded. This court held in a 5 to 2 decision that the *plaintiff* had the burden of establishing *nonpayment*. In *Parker v. Baldwin*, 216 Mich 472, 477, Michigan also held that by the pleadings and the manner in which the case was tried plaintiff had assumed the burden of proving *nonpayment*, although payment was an affirmative defense normally to be pleaded and proved by defendant. In *Manglares v. Passiales*, 214 Mich 188, 190, the Michigan Supreme Court observed:

> "Undoubtedly, there are cases where by reason of the theory of the declaration or where the plaintiff *assumes* the burden of proving nonpayment, such a defense would be available to the defendant without specially pleading it."

Also see *Kahn v. Minthorn*, 178 Mich 312, 319-320. The same exception prevails in federal courts. That is, a party who does not otherwise have the burden of proof on a particular issue may acquire it by *assuming* it. See *Kentucky Vermillion M. & C. Co. v. Norwich etc.*, 146 F 695, 702-703; *Spokane Interstate Fair Assoc. v. Fidelity & Deposit Co.* 15 F 2d 48; *United States v. Patterson*, 34 F 2d 245, 249-250; *Remington-Rand Inc. v. United States*, 202 F 2d 276, 278. In the last mentioned case the court held on page 278 that the United States had assumed the burden of proof by virtue of the opening statement of its attorney. Having once *assumed* the burden of proving a particular issue of a case, the burden stays with the party who assumed it. It cannot be "*unassumed*." See *4 CJS* 743, Appeal & Error §241; *31 CJS* 713, Evidence §104; *3 CJ* 736, Appeal & Error §630; *22 CJ* 70, Evidence §14.

Having pleaded the release as an affirmative defense in *Callen*, under ordinary circumstances the burden of establishing the release would have been upon the defendant railroad. However, this burden or, rather, its converse, the burden of proving the *invalidity* of the release in that case was *assumed* by the plaintiff in this manner: The plaintiff introduced the release as a plaintiff's exhibit and then attempted to avoid it by attacking it on the ground of fraud. See pages 26a-28a and 267a of the *Callen* transcript of record. No such thing occurred in *Patzke*. In this case *validity of the release was pleaded as an affirmative defense* (13a-15a) which was denied by plaintiff's reply (17a). The release was introduced *by defendant* as a defense exhibit (251a, 864a), and plaintiff at no time assumed any burden with repect to proving the invalidity of the release as was done in *Callen*. Furthermore, instead of simply alleging that it had "a full and complete release" as was done in *Callen* (page 8a of *Callen* transcript of record), *the de-*

fendant itself in Patzke raised the issue of the validity of the release by affirmatively alleging that it had a "good and *valid*" release which was a "good and *valid* bar" to plaintiff's action (15a). It follows that under both state and federal law, and regardless of *Porth*, 198 Mich 501, the defendant in *this* case did have the burden of establishing the validity of the release, and the trial court's instruction on this point was not error.

B. After the jury was discharged on April 26, 1957 (809a), defendant filed "a motion for directed verdict" on May 1, 1958 (779a), plaintiff filed motions for judgment on the verdict and allowance of expert witness fees on May 9, 1957 (3a) and defendant filed a motion for judgment notwithstanding the verdict on May 16, 1957 (781a). At least three hearings before the trial court on these motions, *with all counsel present*, were held previous to June 10, 1957 (excerpts from two of these hearings are found on pages 810a and 813a). Yet, counsel made no objections to the trial court's jury instructions until June 10, 1957 (1sb), —6 weeks after the jury had been discharged.

Certainly they should not have been allowed to raise their objections weeks after the jury had gone home. This not only would result in gross injustice to the court, but it is not the law. Garton v. Union City National Bank, 34 Mich 279, 281.

Michigan has held that parties cannot remain silent and thereby lie in wait to ground error after the trial is over upon faulty jury instructions. *Kinney v. Folkerts*, 84 Mich 616, 625.[1]

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[1] But, see a recent contrary division of the Michigan Supreme Court upon the effect of an alleged failure to instruct. *Sakorraphos v. Eastman Stores*, 367 Mich. 96.

Rule 51 of the Federal Rules of Civil Procedure likewise provides that no party may assign error on the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

It is clear that under both the state as well as the federal law a railroad employee ought not be deprived of his verdict on account of an alleged erroneous jury instruction to which objection was not made until six weeks after the jury had gone home.

C. The release was void as a matter of law for a number of reasons. It was obtained from petitioner either by means of fraudulent representations or under a mutual mistake of fact. It was truly a "device" exempting respondent from liability (45 USC §55; *Dice v. Akron, C. & Y. R. Co.*, 342 US 359, 362). It was also given without sufficient consideration under the ruling of this court in *Maynard v. Durham & Southern R. Co.*, 365 US 160, because the consideration therefor was 75% of petitioners wages. See pages 202a, 203a, 252a, 253a, 292a, 439a, 440a, 442a, 460a, 461a, 462a, 488a, 700a and 763a of the joint appendix, nine copies of which have been filed with the clerk pursuant to §4 of Rule 21, Supreme Court Rules.

D. This court has held on several occasions that the trial judge cannot act as a "super jury" and set aside a jury verdict when he differs from it on the facts.

In this case the trial judge commented several times in the absence of the jury and in the presence of the jury during his instructions that perjury had been committed by some of the witnesses who testified. Some of these trial court comments were that there must be perjury and that the court was going to keep its own counsel as to what it

was going to do at the conclusion of the case; that the testimony was irreconcilable, that perjury had been committed and that attorneys were involved; that absolute disregard for Almighty God had been portrayed in the courtroom and that alone stood out in this case; that he was going to do something about it at the conclusion of the case; that someone or several individuals came into court and lied and that there was no reason for the court to give its official sanction to such conduct; that counsel seemed to feel the only thing required was jury determination and the court was in disagreement with this; that a question of fact was not created—that the "question of fact was manufactured by someone in this case,"; etc (575a-577a, 767a, 769a, 774a, 810a-837a).

Importance of a jury decision in FELA cases is illustrated by the opinion of this Court in *Schulz v. Pennsylvania R. Co.*, 350 US 523, 524, wherein it was stated:

> "*The jury trial 'is part and parcel of the remedy afforded railroad workers under the Employer's Liability Act'*, which the Jones Act makes applicable to those working as petitioner's husband was here. The Seventh Amendment to the Constitution provides that 'the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law'. We granted certiorari to consider the failure of the District Court to let this case go to the jury."

Similarly, in this case, certiorari should be granted to consider the failure of the trial judge to let the jury's verdict stand because he disagreed with its findings of fact and believed that plaintiff's witnesses had committed perjury.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TRIAL COURT'S OPINION ON MOTION FOR NEW TRIAL

(Filed May 21, 1958)

Kane, J.:

The above-entitled matter was heard by the Court and jury. Since the verdict, the Court has had the benefit of arguments on the several motions previously filed by the counsel for the respective parties and has listened to the charges and counter-charges which have been made.

It appearing to the Court that for the reasons set forth in Defendant's Motion for a New Trial and because it is the Court's belief that a miscarriage of justice has resulted, a new trial is and the same is hereby ordered.

An order in keeping with this opinion may be presented by defense counsel.

/s/ Edward T. Kane,
Circuit Judge.

Dated: May 21, 1958.

APPENDIX B

OPINION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

(Filed December 3, 1962)

Before the Entire Bench, except Black, J. and Souris, J.

KELLY, J.

This Federal employers' liability action resulted in a jury verdict of $118,000 for plaintiff. The trial court granted defendant's motion for new trial, stating:

> "It appearing to the court that for the reasons set forth in defendant's motion for a new trial and because it is the court's belief that a miscarriage of justice has resulted, a new trial is and the same is hereby ordered."

Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial.

Plaintiff testified that he had been thrown off the top of a box car (December 3, 1955) by a defective hand brake.

Defendant introduced testimony that shortly after the fall plaintiff stated that while he was descending from the car his hold slipped and he fell to the ground. Approximately 6 weeks after the accident plaintiff gave defendant a written statement (January 17, 1956) in regard to the accident, which reads in part:

> "As this car was coming towards me, it was traveling along about 2 or 3 miles per hour and I

> got on in the usual manner on the south and west side of the car after which I climbed up the side ladder and stepped around the corner of the car into the end ladder after which I got up on the brake platform and when the car had run in the clear of the scale track I set the brake and stopped the car after which I started to climb down, at which time my right foot was resting on the brake platform, and my left foot was resting on one of the hand holds in the end ladder and with my left hand I was holding onto the roof grabiron or hand hold, and I let go of the brake wheel with my right hand and as I was reaching for the roof grabiron with it, my left hand slipped off of the roof grabiron or hand hold and I fell to the ground on the west side of the track landing on my feet and from there I fell on my back."

Plaintiff claims that the statement is false and that he falsified it because he was in dire need of money, and feeling the exigencies of fast mounting bills and the needs of his family, he sent for Mr. Wallace (defendant's claim agent); that before Mr. Wallace would talk of paying plaintiff any money at all he said he would have to have a statement as to how the accident happened. After he signed the statement, plaintiff was paid $500 by defendant.

Plaintiff signed a release of claim against defendant (February 27, 1956) and we quote the following from plaintiff's statement of facts and defendant's counter-statement, as set forth in the respective briefs submitted to this Court. Plaintiff states:

> "Plaintiff was told by the railroad doctors that he was in such condition of recovery that he would be able to return to work by March 15, 1956. On February 27, 1956, Mr. Wallace (defendant's claim agent) came to plaintiff's home to make a settlement of the claim. Mr. Wallace telephoned both of the railroad doctors and was told by each doctor that he was positive plaintiff would return to work

on March 15, 1956. Mr. Wallace communicated this information to plaintiff. Mr. Wallace then prepared a release of all liability to be signed by the plaintiff for the purpose of relieving the defendant of all liability for plaintiff's injuries. Plaintiff received another $600 which was to cover his loss of wages up to March 15, 1956 on a 75% basis.

"Before signing the release plaintiff asked Mr. Wallace what would be the situation if he were unable to return to work on March 15, 1956. Mr. Wallace said that in such case the release would be destroyed and plaintiff's case would be reopened. At the time he made this statement about destroying the release Mr. Wallace knew that he had no such authority and could not destroy the release or reopen plaintiff's case.

"On the strength of Mr. Wallace's promise to destroy the release and reopen his case and believing the truth of the railroad doctor's assertions as to his state of health, plaintiff signed the release and received $600 from Mr. Wallace. This release was used at trial by the railroad company to defend this case. On March 15, 1956, plaintiff was unable to return to work. Subsequently on 3 separate occasions he was paid the sum of $300 by Mr. Wallace on behalf of the railroad company. Each time he received a $300 check from defendant plaintiff was required to sign a receipt stating that the same was to be 'credited against settlement or judgment when made.' In July of 1956 Mr. Wallace offered plaintiff $148 as a 'final settlement' of plaintiff's claim. This was refused by plaintiff.

"When plaintiff subsequently consulted his own physician and learned the extent of his disability he requested that the release be destroyed and his claim reopened. The release was never torn up by defendant and plaintiff's case was never reopened."

Defendant says:

> "That it is railroad policy to pay injured employees a percentage of their wages regardless of fault on the part of the railroad; that the railroad always assumed any and all medical expenses and he advanced the various sums to plaintiff in accordance with this policy and because plaintiff was in need. Mr. Wallace obtained a release from plaintiff and it was after it was executed and delivered to Mr. Wallace that there was any conversation with respect to paying additional sums to plaintiff if he did not return to work; and any such promises made to plaintiff were carried out. Plaintiff never told him the brake threw him off the car or that there was anything wrong with it; he testified that the only promises to plaintiff were that if he could not return to work by March 15, 1956, he would see if he could get further consideration.
>
> "Plaintiff is capable of doing a clerk's job and was offered one by the defendant railroad but insisted that he be guaranteed a permanent job and that he would not lose his seniority as a switchman which is impossible for the railroad to guarantee because of the union contract."

The legislature provided (CL 1948, §650.28 [Stat Ann 1943 Rev §27.2618]) that the trial judge be empowered to grant a new trial if "in the opinion of the court, after an examination of the entire cause" the court should decide there has been "a miscarriage of justice."

In *Cooper v. Carr*, 161 Mich 405, this Court stated the trial court's decision would be upheld unless there was no justification or excuse for the ruling, stating (p 412):

> "We are aware of the rule that the granting of a new trial ordinarily rests in the discretion of the trial court, which, if not abused, cannot be interfered with by this Court. To warrant such interfer-

> ence, the abuse ought to be so plain that upon consideration of the facts upon which the trial judge acted, as unprejudiced person can say that there was no justification or excuse for the ruling made."

We recognized a greater latitude in granting than in refusing new trials in *Haskin-Morainville Paper Co. v. Bates Valve Bag Corp.*, 268 Mich 443, 450, by quoting with approval 4 C J, §2813, pp 831, 832:

> "'Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, since in such cases the rights of the parties are not finally settled as they are where the new trial is refused."

The trial court charged the jury with respect to the burden of proof as to the validity of the release as follows:

> "Now, there has been considerable testimony concerning this instrument and I must charge you that the burden of proving by the preponderance of the evidence that this is a valid release and that the same is such, rests upon the defendant in this case rather than the plaintiff and that is the sole and only factor that must be established by the defendant by a preponderance of the evidence because if you will remember, when I read to you and talked to you about the preponderannce of the evidence, I was very careful at that time to mention to you that the matters that were alleged in the plaintiff's declaration and which proof in substance and sustaining the same have been offered, this matter of the validity of the release, the burden of proof of that by a preponderance of the evidence rests upon the defendant and not upon the plaintiff. In other words, the burden of proving that the instrument or release involved was invalid is not a responsibility of the plaintiff to prove."

That this instruction is contra to the decisions of this Court is evidenced by our decision in *Porth v. Cadillac Motor Car Co.*, 198 Mich 501.

Federal law in regard to validity of releases under the Federal employers' liability act is similar to our State law. The United States Supreme Court in *Callen v. Pennsylvania Railroad Co.*, 332 US 625, stated (p 630):

> "Until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

Dice v. Akron, Canton & Youngstown Railroad Co., 342 US 359, involved an action by a railroad fireman who was injured when the engine in which he was riding jumped the track. An action was brought in the Ohio state court under the Federal employes' liability act. The purported release, and the ruling by the Ohio supreme court holding that Ohio law and not Federal law governed, were commented upon by the supreme court of the United States as follows (pp 361, 362, 369):

> "We * * * hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. * * * Releases and other devices designed to liquidate or defeat injured employees' claims play an important part of the federal act's administration. * * * Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. * * * One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity,

> either by fraud practiced upon him or by a mutual mistake under which both parties acted.'"

We agree with the appellee that: "The validity of the release is an issue which completely controls plaintiff's right of recovery and since the charge of the court in this case was diametrically opposed to the correct law in this respect, there was reversible error which alone justified the trial court in granting a new trial and justifies this Court in affirming the action of the lower court."

We affirm the order of the trial court and remand for new trial. Costs to appellee.

APPENDIX C

TRIAL COURT'S ORDER GRANTING MOTION FOR NEW TRIAL

(Filed June 2, 1958)

At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.

Present: Honorable Edward T. Kane, Circuit Judge.

In this cause, upon reading and filing defendant's motion for new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:

It Is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.

Edward T. Kane,
Circuit Judge.

APPENDIX D

JUDGMENT OF THE MICHIGAN SUPREME COURT

(Filed December 3, 1962)

We affirm the order of the trial court and remand for new trial. Costs to Appellee.

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

45 USC §11

It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, v. 160, §2, 36 Stat. 298.

45 USC §51

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier, in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; ~~Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.~~

45 USC §55

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, §5, 35 Stat. 66.

45 USC §56

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the resi-

dence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, §6, 35 Sat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 1f, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 896

FRANK PATZKE, JR.,
Petitioner,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO.,
a Virginia Corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1962

No. 896

FRANK PATZKE, JR.,
Petitioner,
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THE CHESAPEAKE & OHIO RAILWAY CO.,
a Virginia Corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Clair, Michigan, is printed as Appendix A, Petitioner's Petition, page 19a, and is unreported. The order of the Circuit Court for the County of St. Clair, Michigan, is

printed as Appendix I, *infra*, and is unreported. The opinion and order are also printed in the record (R. 803a, R. 804a, respectively).

The opinion of the Supreme Court of the State of Michigan is printed as Appendix B (Petitioner's Petition, page 20) and is reported at 368 Mich. 190.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on December 3, 1962. The time for filing the Petition ran on March 4, 1963. The Petition was filed March 6, 1963. An order granting an extension of time was not entered until March 5, 1963. Since the order granting the extension of time was entered subsequent to the final date on which the Petition could be filed, the Court does not have jurisdiction of this case. 28 U.S.C.A. §2101(c).

To the extent that the reasons set forth by Respondent for denying the writ of certiorari are deemed to go to the jurisdiction of this Court, Respondent respectfully asserts that this Court does not have jurisdiction to issue the writ. If, however, the Court does have jurisdiction, it is invoked under 28 U.S.C.A. §1257(3).

STATUTES AND RULES INVOLVED

In addition to statutes set forth in the Petition, the following statutes and rules are pertinent:

Compiled Laws of Michigan, 1948, §650.28 (Mich. Stat. Ann. 1943 Rev., §27.2618), set forth in Appendix C *infra*.

Michigan Court Rule 23, Sec. 2; Michigan Court Rule 24; and Michigan Court Rule 67, Sec. 1, set forth in Appendices A, B and D, respectively, infra.

28 U.S.C.A. 2101(c), set forth in Appendix J, infra.

PREFACE TO "QUESTIONS PRESENTED"

Respondent cannot accept the questions set forth by Petitioner since none of them were raised by petitioner on his appeal to the Supreme Court of Michigan and the "questions presented" improperly seek a general review on the merits of the case. However, if this Court is of the opinion that one or more of the matters covered by Petitioner's "questions presented" were properly raised by Petitioner, then Respondent would characterize the "questions presented" by this Petition as follows:

QUESTIONS PRESENTED

I.

Is a judgment of the Highest Court of a State affirming the order of the Trial Court in granting Respondent a new trial and remanding the case to the Trial Court for a new trial judgment reviewable by this Court under 28 U.S.C.A. 1257(3)?

II.

Is a judgment of the Supreme Court of Michigan reviewable by this Court when the judgment merely affirms an order of the Trial Court granting Respondent a new trial and the order granting the new trial and the judgment

affirming the order rests upon independent and adequate state grounds?

III.

Where a judgment of the Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court and has not decided a Federal question of substance contrary to the applicable decisions of this Court, is the judgment subject to review by this Court?

IV.

Does it constitute a violation of the Seventh Amendment to the Constitution of the United States for the Supreme Court of Michigan to enter a judgment affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence?

V.

When an FELA action is prosecuted in a State Court is the time, manner and circumstances under which a party must take exceptions to instructions to the jury matters of procedure governed by the law of the State?

VI.

Where Petitioner has failed to comply with Rule 23(f) of this Court by failing to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, but merely seeks a general review on the merits of the case, and, further, where petitioner has failed to comply with Rule 22 of this Court by failing to timely file his petition, should not the petition be dismissed?

PREFACE TO STATEMENT OF THE CASE

Respondent cannot accept Petitioner's "The basic facts" as a Statement of the Case because it is incomplete, incorrect, inaccurate, argumentative, opinionated and misleading. "The basic facts" state that the Trial Court granted Respondent a new trial on only one 'presently relevant ground", when the clear language of the order of the Trial Court sets forth multiple grounds for the granting of the order (Petitioner's Petition, Appendix C, p. 26; R. 785a, *et seq.*); it states that the Supreme Court of Michigan affirmed the order of the Trial Court upon only one ground, when the Judgment of the Michigan Supreme Court (Petitioner's Petition, Appendix D, p. 27) is clearly to the contrary; it understakes to set forth reasons for the Trial Court's action in granting a new trial contrary to the grounds set forth in the Trial Court's order; it fails to point out subsequent pleadings filed by Petitioner in which he affirmatively attacked the Release involved; it fails to point out the undisputed fact that Petitioner executed the Release for the recited consideration; and it fails to point out where in the record, Petitioner has raised any of the questions on appeal to the Supreme Court of Michigan which are incorporated in "The basic facts".

STATEMENT OF THE CASE

On September 21, 1956, Frank Patzke, Jr., resident of Port Huron, Michigan, filed an F.E.L.A. action (R. 6a) in the Circuit Court of St. Clair County, Michigan, against Respondent seeking damages for an accident which occurred on December 3, 1955 in Port Huron, Michigan, allegedly caused by a defective hand brake. Respondent duly filed its answer (R. 12a), and, in accordance with the provisions of Michigan Court Rule 23, Sec. 3 (Appendix A, *infra*), set forth as an affirmative defense the fact that Petitioner had executed a good and valid Release of the claim (R. 14a) and by way of amendment to the affirmative defense set forth in its answer Respondent attached a copy of said Release to its answer (R. 14a, R. 15a, R. 16a, R. 17a). Thereafter, in accordance with Michigan practice and procedure, Michigan Court Rule 24 (Appendix B, *infra*), Petitioner, Frank Patzke, Jr., filed his reply to Respondent's affirmative defenses in which he attacked the Release as void on the grounds of fraud and mistake of fact (R. 17a, R. 18a, R. 19a, R. 20a, R. 21a). Thereafter Petitioner amended his declaration (R. 23a), attacking the Release as void on the grounds of fraud and mistake.

The case came on for trial, during which Petitioner admitted executing the Release for the recited consideration and thereafter attacked the Release as void on the grounds of fraud and mistake. At the conclusion of the trial the jury returned a verdict for Petitioner. Respondent's motions for directed verdict and for judgment *non obstante veredicto* were denied by the Trial Court (R. 783a). Judgment in favor of Petitioner was entered on the verdict (R. 784a). Subsequently the Trial Court, upon motion duly filed by Respondent (R. 785a), and pursuant to the law of

Michigan, Ch. 1948, §650.28 [Stat. Ann. 1943 Rev. §27.2618] (Appendix C, *infra*), entered the following order granting Respondent's motion for a new trial (Appendix I, *infra*; R. 804a):

> "At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.
>
> "Present: Honorable Edward T. Kane, Circuit Judge.
>
> "In this cause, upon reading and filing defendant's motion for new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:
>
> "It is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.
>
> "s Edward T. Kane,
> Circuit Judge."

Thereafter Petitioner perfected an appeal to the Supreme Court of Michigan, and, in accordance with Michigan Court Rule 67 (Appendix D, *infra*), set forth on the first page of his brief the sole question upon which the appeal was based, as follows (Appendix E, *infra*):

"STATEMENT OF QUESTIONS INVOLVED

"Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

"Appellant says 'Yes.'
"Appellee says 'No.'
"The Circuit Court says 'No.'"

The Supreme Court of Michigan affirmed the order of the Trial Court granting Respondent a new trial on the grounds set forth in Respondent's motion for new trial, and, in its opinion characterized the question more broadly than the sole question raised by Petitioner on his appeal, saying (Appendix B, Petitioner's Petition, page 20):

"Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial."

From the judgment of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial Petitioner seeks a writ of certiorari from this Court under the provisions of 28 U.S.C.A. §1257(3).

REASONS FOR DENYING THE WRIT

I.

The opinion of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial and remanding the cause to the Trial Court for a new trial is not a final judgment reviewable by this Court under 28 U.S.C.A. §1257(3).

II.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial is not reviewable by this Court when the order granting the new trial and judgment affirming the order rests upon independent and adequate state grounds.

III.

The Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court; nor has it decided a Federal question of substance in a way not probably in accord with applicable decisions of this Court; but, on the contrary, the language of the opinion is in accord with the applicable decisions of this Court in cases where the same question has been raised.

IV.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions to the jury; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence; does not constitute a violation of the Seventh Amendment to the Constitution of the United States.

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V.

When an F.E.L.A. action is prosecuted in a State Court the time, manner and circumstances under which a party must take exceptions to instructions to the jury is a matter of procedure governed by the law of the State and is not reviewable by this Court.

VI.

When Petitioner has failed to comply with Rule 23(f) of this Court in that he has failed to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, and Petitioner further failed to comply with Rule 22 of this Court by failing to timely file his Petition the Petition should be dismissed.

ARGUMENT

I.

The opinion of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial and remanding the cause to the Trial Court for a new trial is not a final judgment reviewable by this Court under 28 U.S.C.A. §1257(3).

This Court has repeatedly held that a judgment by the highest court of a State in which a decision could be had which merely remands the case for trial is not a final judgment reviewable under 28 U.S.C.A. §1257(3).

In *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395, this Court stated on page 397:

> "We have held in too many cases even to justify citation, that a judgment reversing a case and re-

> manding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court."

In *United States v. Denver and Rio Grande Railroad Company*, 191 U.S. 84, this Court stated on page 93:

> "As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court."

In *Urie v. Thompson, Trustee*, 337 U.S. 163, this Court stated on page 171:

> "From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner has stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute.' 28 U.S.C. (344(b) [now (1257(3)]."

The general rule set forth in *U.S. v. Denver and Rio Grande Railway Company*, *supra*, and *Urie v. Thompson Trustee*, *supra*, to the effect that judgments granting a new trial are not final and therefore not reviewable by this Court has been consistently followed in the United States Circuit Courts of Appeal. See *e.g.*, *Ford Motor Co. v. Bynum Motor Sales, Inc.*, 185 F. 2d 531 (CA 6); *Balicki v. Central Greyhound Lines, Inc. of New York*, 150 F. 2d 402 (CA 3).

It is abundantly clear that the Supreme Court of Michigan did not consider its judgment entered herein, which

affirmed the order of the Trial Court granting Respondent a new trial on multiple grounds, a final judgment. On page 4 of its opinion, the Supreme Court of Michigan said (Petitioner's Petition, Appendix B, P. 24):

> "'Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, *since in such cases the rights of the parties are not finally settled* as they are where the new trial is refused." (Emphasis supplied.)

The fact that a judgment of a highest State court which merely remands a case to the Trial Court for a new trial is not a final judgment reviewable by this Court is cogently stated thusly by *Stern & Gressman*, Supreme Court Practice (3rd ed.) Sec. 3-12, page 77:

> "The most obvious non-final judgment of this character is one which orders a new trial following final disposition of the legal issues at stake."

In the instant case Petitioner seeks to have this Court review a judgment of the Supreme Court of Michigan which merely affirms an order of the Trial Court granting a new trial. Since judgments of this type are interlocutory and not final, they are not reviewable by this Court and the Petition should be dismissed.

II.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial is not reviewable by this Court when the order granting the new trial and judgment affirming the order rests upon independent and adequate state grounds.

The legislature of the State of Michigan has provided as follows (CL. 1948, 605.2 [Stat. Ann. 1943 Rev. 27A.2618]):

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

The constitutionality of the above-cited statute was never attacked or discussed by Petitioner at any time in these proceedings.

In the instant case the Trial Court's order granting Respondent's motion for new trial (R. 81a) was bottomed on all of the independent and adequate State grounds set forth in Respondent's motion for new trial (R. 78a, *et seq.*) and on the further ground that the verdict of the jury had resulted in a "miscarriage of justice". The judgment of the Supreme Court of Michigan was as follows (Petitioner's Petition, Appendix B, P. 27a):

> "We affirm the order of the trial court and remand for new trial. Costs to appellee."

The opinion of the Supreme Court of Michigan clearly shows the sole question raised by Petitioner on appeal to that court (Petitioner's Petition, Appendix B, p. 20):

> "Plaintiff appeals contending the trial judge abused his discretion in granting a new trial."

Rule 67, Sec. 1 (Appendix D, *infra*) of the Michigan Court Rules required Petitioner to set forth on page 1 of his brief to that court the questions involved in the appeal. Pursuant to said Rule the sole question raised by Petitioner was as follows (Appendix E, *infra*):

> "STATEMENT OF QUESTIONS INVOLVED
>
> "Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?
>
> "Appellant says 'Yes.'
> "Appellee says 'No.'
> "The Circuit Court says 'No.'"

In disposing of the sole issue raised by Petitioner the Supreme Court of Michigan, in its opinion, quoted the above-cited Michigan statute empowering the Trial Court to exercise its discretion in the granting of new trials and thereafter cited *Cooper v. Carr*, 161 Mich. 405 and *Hoskin-Maraiuville Paper Co. v. Bates Valve Bag Corp.*, 268 Mich 443, 450, supporting this position. The instant case, *Latzke v. Chesapeake & Ohio Railway Company*, 368 Mich. 190, was decided on December 3, 1962. The following term of court the Supreme Court of Michigan handed down its decision dated February 7, 1963 in *Herman v. Ploszczanski*, 369 Mich. 252, in which the instant case was cited at page 260 as authority for the proposition that the granting of a new trial is within the sound judicial discretion of the Trial

Court. Indeed, even the headnotes to the citation in *Pet'r's v. Chesapeake & Ohio Railway Company, supra*, clearly show that the judgment of the Supreme Court of Michigan rested on independent State grounds. Headnotes 1 and 2 of said citation appear as follows:

> "1. New Trial—Discretion of Court—Miscarriage of Justice.
>
> A trial judge is empowered to grant a new trial if in his opinion, after an examination of the entire cause, the court should decide there has been a miscarriage of justice (CL. 1948, §650.28)."
>
> "2. Same—Discretion of Court.
>
> A circuit judge has a wide discretion in granting or refusing a new trial either upon his own motion or that of the parties, somewhat greater latitude being allowed in granting same since it is not a final settlement of the rights of the parties."

Against this background Petitioner now argues that certain statements used by the Supreme Court of Michigan in its opinion in the instant case requires this Court to find the judgment of the Supreme Court of Michigan rested solely on the Federal ground that the Trial Court erred in instructing the jury with respect to the party upon whom rests the burden of proving the validity of a release. This argument must be dismissed since it completely ignores the fact that Petitioner never raised this Federal question on his appeal, therefore any statements in the Court's opinion regarding it were not necessary to the decision in the case; it ignores the decision in *Hermanek v. Pleszczynski, supra*, wherein the Supreme Court of Michigan has cited the instant case as authority for a trial judge to exercise his judicial discretion in granting new trials; it ig-

nores the clear language of the order of the Trial Court granting Respondent a new trial based upon several independent and adequate State grounds; and it ignores the clear language of the Judgment of the Supreme Court of Michigan, to wit (Petitioner's Petition, Appendix D, P. 27):

> "We affirm the order of the trial court and remand for new trial. Costs to appellee."

The clear language of the above-quoted judgment approves and adopts without reservation the entire order of the Trial Court (Appendix I, *infra;* R. 804a) granting Respondent a new trial on the multiple grounds set forth in the order.

This Court has repeatedly held that it reviews judgments, not statements in opinions and will not pass on federal questions discussed in opinions where it appears that the judgment rests on adequate State grounds. *Black, et al. v. Cutter Laboratories*, 351 U.S. 292.

As this Court stated in *Lynch, et al. v. New York ex rel. Pierson*, 293 U.S. 52, at page 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

The above principle was reaffirmed by this Court on March 18, 1963 in *Edward M. Fay, Warden, et al., Peti-*

Bowers v. Charles Noel, 31 L.W. 4255, 4266, which in this Court said:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds."

In the instant case, Petitioner has failed to show affirmatively that a federal question was presented for decision to the highest Court of the State of Michigan, and that its decision of the federal question was necessary to the determination of the cause. On the contrary, it appears affirmatively that the judgment of the Supreme Court of Michigan was founded on independent State grounds permitting a Trial Court to exercise its sound judicial discretion in granting new trials pursuant to CL 1948, 650.28 [Stat. Ann. 1943 Rev. 27.2618] quoted above, also Appendix C, *infra*.

III.

The Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court; nor has it decided a Federal question of substance in a way not probably in accord with applicable decisions of this Court; but, on the contrary, the language of the opinion is in accord with the applicable decisions of this Court in cases where the same question has been raised.

It is Respondents' position that the judgment of the Supreme Court of Michigan *was not based solely* upon the erroneous instruction of the trial court that the burden of proving the validity of a release rests upon Respondent rather than Petitioner. Assuming, however, for the purposes of argument only, that this federal question of sub-

stance was decided by the Supreme Court of Michigan, and that its determination was necessary to support the judgment, the Petition should still be dismissed since the opinion of the Supreme Court of Michigan follows, verbatim, the opinion of this Court in *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, which is the law today. Therefore, we are not confronted with a federal question of substance not heretofore determined by this Court nor are we confronted with a decision of a State court which has allegedly decided a federal question in a way probably not in accord with the applicable decisions of this Court; but, on the contrary, we have a State court opinion which follows verbatim the opinion of this Court in the *Callen* case, *supra*.

In *Callen*, *supra*, Respondent set forth as an affirmative defense in accordance with Fed. Rules Civ. Proc., Rule 8(c) (Appendix F, *infra*) a release which it had obtained from an injured employee. In the instant case Respondent set forth as an affirmative defense in accordance with Rule 23(3) of the Michigan Court Rules (Appendix A, *infra*) a release it obtained from Petitioner. Under both the Federal Rules of Civil Procedure and the Michigan Court Rules Respondent is required to set forth a release it has obtained from Petitioner as an affirmative defense. In both the *Callen* case, *supra*, and the instant case Petitioner *admitted* executing the Release and receiving the recited consideration. In *Callen*, *supra*, Petitioner specifically asked this Court to place the burden of establishing the validity of a release upon Respondent. This Court refused to change the well established law, saying at page 630:

> "* * * However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made

no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. *One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.*" (Emphasis supplied.)

In its opinion, the Supreme Court of Michigan cites, with approval, the *Callen* case, *supra*, holding the Michigan law to be similar. Petitioner argues at length (Petitioner's Petition, pp. 10, 11 and 12) that the Supreme Court of Michigan did not mean what it clearly says in its opinion, to wit, (Petitioner's Petition, Appendix B, p. 25):

> "Federal law in regard to validity of releases under the Federal employers' liability act is similar to our State law."

apparently on the grounds that older Michigan decisions in other than release cases may have been treated differently. Next Petitioner argues that the opinion of the Supreme Court of Michigan should not have reaffirmed *Porth v. Cadillac Motor Car Co.*, 198 Mich. 501, which is to the same effect as the *Callen* case, *supra*. Regardless of Petitioner's urgency in presenting this matter, the plain fact remains that the Supreme Court of Michigan in the instant case reaffirmed *Porth v. Cadillac Motor Car Co.*, *supra*, as setting forth the law of Michigan with respect to release cases and held it to be similar to the Federal law. In any event, the law of Michigan with respect to release cases is not the

concern of this Court since that is clearly a matter of State law.

Next Petitioner would have this Court believe that the mere fact that Respondent set forth as an affirmative defense under Michigan Court Rule 23(3) (Appendix A, *infra*) the release which it obtained from Petitioner required Respondent to assume the burden of proving the validity of the release. This argument ignores the facts that Petitioner filed a Reply (R. 17a, *et seq.*) attacking the validity of the release; filed an amendment to his declaration (R. 23a *et seq.*) attacking the validity of the release; and during the trial of the case, admitted executing the release for the recited consideration and, thereafter, attacked its validity by way of testimony on the grounds of fraud and mistake of fact. *There was nothing unusual about the way this release was introduced into the case. It was introduced in this case in the same way as releases are introduced in other cases, whether under the provisions of Federal Rule Civ. Proc. 8(c), Michigan Court Rule 23(3), or any other rule of pleading requiring Respondent to allege any matter which is likely to take Petitioner by surprise. This is the way releases are always introduced in any trial!*

The procedural rules of both the Federal Courts and State Courts requiring Respondent to set forth a release as an affirmative defense do not change the substantive law which requires the party attacking a release to bear the burden of showing it is tainted with invalidity. *The only requirement resting on Respondent is to show that it has obtained a Release from Petitioner.* In the instant case it is admitted that Petitioner executed the Release and received the recited consideration. Thereafter the burden was on Petitioner to show that the contract (Release) he has made is tainted with invalidity. The law of the *Callen*

case, *supra*, was cited and followed in so many decisions our Federal Courts of Appeals and State Courts of last resort that citations are too numerous to mention, e.g. *Parris v. Pennsylvania R. Co.*, 198 F. 2d 731, cert. den. 344 U.S. 898; *Cameglia v. New York Cent. R. Co.*, 199 F. 2d 698; *Cleghorn v. Terminal Railroad Ass'n of St. Louis*, 289 S.W. 2d 13.

IV.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence, does not constitute a violation of the Seventh Amendment to the Constitution of the United States.

Although this matter was not timely raised by Petitioner on his appeal to the Supreme Court of Michigan, he alludes to it in Question IV of Questions Presented, as follows:

"IV.

"Did the setting aside of the verdict and judgment because the trial judge disagreed with the jury's determinations of fact constitute a violation of the Seventh Amendment to the Constitution of the United States?"

The instant case, of course, was prosecuted in the State Courts of Michigan. The statute of the State of Michigan (CL 1948, §650.28 [Stat. Ann. 1943 Rev. §27.2618]) which authorizes the Trial Court to grant a new trial when, in its opinion, after an examination of the entire cause, it is of the opinion that for one or more reasons there has been a miscarriage of justice, was never alleged to be unconstitutional or attacked on any other grounds. On the contrary, the statute was never mentioned by Petitioner in the entire proceedings.

With respect to Petitioner's contention, that the action of the Trial Court in granting Respondent a new trial, and the action of the Supreme Court of Michigan in affirming the granting of a new trial constituted a violation of the Seventh Amendment to the Constitution of the United States, we respectfully refer the Court to its decision in *Minneapolis & St. Louis Railroad Company v. Bombolis, Administrator of Nanos*, 241 U.S. 211. This was an FELA case wherein Petitioner, against whom judgment had been entered, contended that the judgment was void since the verdict upon which it was based was rendered by a jury, admittedly no constituted in accordance with the common law, and therefore Petitioner urged a violation of the Seventh Amendment to the Constitution of the United States. In denying Petitioner's contention this Court said at page 217:

> "Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron v. Baltimore*, 7 Pet.

243; *Fox v. Ohio*, 5 How. 410, 434; *Twitchell v. Commonwealth*, 7 Wall. 321; *Brown v. New Jersey*, 214 U.S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *Walker v. Sauvinet*, 92 U.S. 90; *Pearson v. Yewdall*, 95 U.S. 294. "So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

The provisions of the Seventh Amendment to the Constitution of the United States do not apply to actions prosecuted in our state courts. Therefore, the action of the Trial Court, affirmed by the Supreme Court of Michigan, in setting aside the jury verdict and granting Respondent a new trial under the well established law of the State of Michigan is not subject to review by this Court on the grounds that such action constituted a violation of the Seventh Amendment.

If we were to assume for the moment, for the purposes of argument only, that the instant case had been prosecuted

in the Federal courts, the Petition should still be dismissed since the right to grant a new trial in the Federal courts for the same reasons, which were advanced in the instant case has long been recognized. Fed. Rules Civ. Proc., Rule 59(a), 28 U.S.C.A. (Appendix G, *infra*) recognizes the basic common law principle that it is the duty of the judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial. *Barron and Holtzoff* (Wright Ed.), Federal Practice and Procedure, Vol. 3, §1302. The inherent right and power of the Courts to set aside a verdict and grant a new trial is so well recognized that citing of authorities is superfluous. The reasons and necessity for giving the courts this discretionary power is ably stated in *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350 and *Southern Pac. Co. v. Guthrie*, 186 F. 2d 926.

In *Aetna Casualty & Surety Co. v. Yeatts*, *supra*, with reference to a motion for new trial, the Court said at page 352:

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

In *Southern Pac. Co. v. Guthrie*, *supra*, in discussing the authority of a trial court to grant a new trial, the court said at page 933, note 11:

> "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials were firmly settled in England

> before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly*."

This Court fully recognizes the right of a trial court to grant a new trial. In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, this Court said, at page 251:

> "* * * The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

In *3 Barron and Holtzoff, Federal Practice and Procedure*, §1302.1, the following is noted on page 355:

> "By way of summary, the discretion of the trial court in passing on a motion for a new trial where it is claimed that the verdict is against the weight of the evidence is not subject to review. * * *"

Professor James W. Moore reaches the same conclusion in *6 Moore's Federal Practice*, ¶59.08, where he states, on page 3816:

> "A motion for new trial, unlike the motion for directed verdict or for judgment n.o.v., does not

> seek a final judgment, but, as the term implies, another trial. And unlike those other motions, a motion for new trial is addressed to the sound discretion of the trial court; and the grant or denial of a motion for new trial is not reviewable, except where the trial court acts under the compulsion of a mistake of law, or lacks power to grant the motion, as where the motion is not timely, or where the trial court fails to exercise its discretion, or where it abuses its discretion. And a motion for new trial on the ground that the verdict is against the weight of the evidence and the trial court's ruling thereon are within the foregoing principles."

In his argument (Petitioner's Petition, p. 16) Petitioner lays great stress on this court's decision in *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 524, as supporting his position that the action of the Trial Court in setting aside the verdict and judgment constituted a violation of the Seventh Amendment to the Constitution of the United States. Again, as in the court below, Petitioner makes the gross error of failing to distinguish between a case where the trial court directs a verdict or sets aside a jury verdict and enters judgment for the opposite party, and the case where a new trial in granted. In framing his Question IV to this Court Petitioner neglects to assert the fact that a new trial was granted Petitioner, and in citing *Schulz v. Pennsylvania R. Co., supra*, Petitioner fails to point out to this Court that *Schulz* was a case in which a verdict was directed for Respondent. Petitioner's handling of this matter is patently misleading since the instant case is not concerned with the direction of a verdict by the trial court. Petitioner has not been deprived of a trial by jury in this cause, but rather has been granted a trial by a new jury. While there are certain limitations to the authority of a trial court to direct a verdict, the basic and historic right of a trial court to grant a new trial is not so circumscribed.

This basic and historic right to grant a new trial is well stated in the dissenting opinion of Mr. Justice Black, with whom Mr. Justice Douglas concurred, in *Galloway v. United States*, 319 U.S. 372, wherein they stated at page 400:

> "As Hamilton had declared in The Federalist, the basic judicial control of the jury function was in the court's power to order a new trial. In 1830, this Court said: 'The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford, supra*, at 448. That retrial by a new jury rather than factual reevaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum v. New York Life Insurance Co.*, 228 U.S. 364."

The principle that our courts retain a basic judicial control of the jury function was fully recognized by this Court in the recent case of *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, where the Court said *that the system of judicial supervision still exists in this (FELA) as in other types of cases.* The principle of judicial control by the Trial Court over the jury function is well recognized by this Court in *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 310 U.S. 150, wherein Mr. Justice Douglas, speaking for the majority of the Court, stated, at page 247:

> "Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474. . . ."

and on page 248:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. * * *"

This same principle was again affirmed by this Court in *United States v. Johnson*, 327 U.S. 106, where Mr. Justice Black, speaking for the majority of the Court, stated, at page 111:

> "* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States*, 217 U.S. 509; *Holt v. United States*, 218 U.S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481." * * *"

One of the most cogent reasons for granting to the trial judge the discretionary power to grant or deny a new trial is the obvious fact that they preside where things happen that are visible to the human eye and audible to the human ear, yet never find their way into typed or printed pages so as to be part of an appellate review.

Since the granting of a new trial does not constitute a violation of the Seventh Amendment to the United States Constitution, and since the granting of a new trial is within the sound discretionary powers of the trial court, the Petition should be dismissed.

V.

When an F.E.L.A. action is prosecuted in a State Court the time, manner and circumstances under which a party must take exceptions to instructions to the jury is a matter of procedure governed by the law of the State and is not reviewable by this Court.

Although Respondent contends that Petitioner's Question II listed under Questions Presented is not properly before this Court for review since Petitioner did not raise it on appeal, if we assume for the purposes of argument only that Question II was properly raised by Petitioner the Petition should still be dismissed because the subject raised is purely a question of procedure which is governed by the law of the State. Rules of practice with respect to instructions to the jury are matters of procedure which are governed by the law and practice of the State court. As this Court said in *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U. S. 310, at page 316:

> "But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. *Louisville & Nash. R.R. Co. v. Harriel*, 115 Kentucky 877, 882; *West Kentucky Coal Co. v. Davis*, 138 Kentucky 667, 674; *Louisville, H. & St. L. Ry. Co. v. Roberts*, 144 Kentucky 820, 824.
>
> "Although the present action was based upon a Federal statute, it was triable and tried in a state court, hence local rules of practice and procedure were applicable. *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511; *Minneapolis & St. Louis R.R. Co. v. Bombolis*, this day decided, ante, p. 241."

To the same extent, see *Atlantic Coast Line Railroad Company v. Mims, Administratrix of Mims, supra.*

Under Michigan law the Trial Court is required to correctly instruct the jury on the law of the case whether or not any specific instructions are tendered by the parties. Failure to do so is error. *Sakarraphos v. Eastman Kodak Stores, Inc.*, 367 Mich. 96, 116 N.W. 2d 227.

In the instant case Petitioner made no objection to Respondent placing upon the record its exceptions to the Court's instructions to the jury after the jury had been discharged. It had been previously agreed by all the counsel and approved by the Trial Court that any exceptions to the Court's instructions to the jury could be made after the instructions were given by the Trial Court and after the official transcript thereof was available for counsels' use. See Affidavit of the Trial Judge, Appendix H, *infra.*

VI.

When Petitioner has failed to comply with Rule 23(f) of this Court in that he has failed to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, and Petitioner further failed to comply with Rule 22 of this Court by failing to timely file his petition the Petition should be dismissed.

The burden is upon Petitioner to show that he timely raised and relied upon a federal question before the Supreme Court of Michigan; that the Supreme Court of Michigan decided the federal question; and that the decision was necessary to sustain the judgment of the Court. There is no presumption that it did so. This Court must be able to say clearly, from the whole record, that a cer-

tain provision of the Constitution or of an Act of Congress was "*relied on by the party who filed the Petition,*" and the right thus claimed by him was denied. *Chicago, Indianapolis and Louisville Railway Company v. McGuire*, 196 U.S. 128. (Emphasis supplied.)

Petitioner has failed to comply with Rule 23(f) of this Court, for nowhere in the Petition has Petitioner made any specific reference to the places in the record where the matters appear that will show a federal question was timely and properly raised by Petitioner so as to give this Court jurisdiction to review on writ of certiorari. Petitioner merely alludes to these questions on page 5 of his Petition as having been raised in the Trial Court but does not specifically refer to any place in the record where the alleged questions were raised by Petitioner. *The Petition is void of any specific reference to the places in the record where Petitioner has raised these questions on appeal.*

None of the four questions presented by Petitioner under his statement of "Questions Presented" in the Petition was raised by Petitioner on appeal to the Supreme Court of Michigan. On the contrary, the opinion of the Supreme Court of Michigan cited as Appendix B on page 20 of the Petition sets forth Petitioner's sole grounds of appeal to that court, to wit:

> "Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial."

As heretofore pointed out by Respondent, the sole question raised by Petitioner on appeal to the Supreme Court of Michigan, pursuant to Michigan Court Rule 67(1) (Appendix D, *infra*), is set forth on the first page of his Brief to the Supreme Court of Michigan as follows (Appendix E, *infra*):

"STATEMENT OF QUESTIONS INVOLVED

"Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

"Appellant says 'Yes.'
"Appellee says 'No.'
"The Circuit Court says 'No.'"

As this Court said in *Atlantic Coast Line Railroad Company v. Mims, Administratrix of Mims*, 242 U. S. 432, on page 535.

> "To become the basis of a proceeding in error from this Court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code, §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court. * * *"

and on page 536:

> "While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review. *Baldwin v. Kansas*, 129 U.S.

52, *Ogden State Co. v. Butler County*, 166 U.S. 648, and therefore, for want of jurisdiction, the writ of error is *dismissed*."

In addition to the foregoing, Petitioner failed to comply with Rule 22 of this Court, for it appears that the judgment of the Supreme Court of Michigan was dated December 3, 1962. The time for filing the Petition ran on March 3, 1963 but since March 3 was a Sunday the time expired on March 4, 1963. An order was entered on March 5, 1963 granting Petitioner additional time in which to file the Petition. The Petition was filed on March 6, 1963. Since the order granting the extension of time in which to file a Petition was not granted until the time for filing had run, the Petition was not timely filed and should be dismissed.

Since the questions presented in this Petition were not timely and properly raised by Petitioner on appeal to the Supreme Court of Michigan and since the Petition was not timely filed, this Court does not have jurisdiction to review the judgment on writ of certiorari.

"This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted." *Chicago, Indianapolis and Louisville Railway Company v. McGuire*, *supra*.

CONCLUSION

Since the rights of the parties heretohave not been finally decided by the judgment of the Supreme Court of Michigan, and for all of the other reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. STRAUB,
Attorney for Respondent,
6-102 General Motors Building,
Detroit 2, Michigan.

CHASE S. OSBORN,
Of Counsel for Respondent,
220-226 Peoples Bank Building,
Port Huron, Michigan.

APPENDIX A

MICHIGAN COURT RULES

Rule 23(3)

ANSWERS AT LAW AND IN EQUITY

Sec. 3. The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, statute of limitations, illegality, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute, or by reason of nondelivery, want or failure of consideration, in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the plaintiff's declaration or bill of complaint, in whole or in part, and any ground of defense which, if not raised on the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the defendant's answer.

APPENDIX B

MICHIGAN COURT RULES

Rule 24

REPLIES

Sec. 1. New matter alleged in the answer filed in any action shall be answered by a reply in the same manner that allegations in the declaration or bill of complaint are required to be admitted or denied in the answer.

Sec. 2. If the plaintiff desires to meet any defense set up in an action at law by confessing and avoiding the same, the facts constituting such confession and avoidance shall be specifically pleaded in the reply.

Sec. 3. Whenever the pleading of the defendant contains a recoupment or set-off, the plaintiff shall file a reply to which he shall plead thereto in the same manner as though such recoupment or set-off were pleaded in a declaration.

APPENDIX C

Compiled Laws of Michigan. 1948. §650.28 [Mich Stat Ann 1943 Rev. §27.2618]

No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

APPENDIX D

MICHIGAN COURT RULES

Rule 67(1)

APPELLANT'S BRIEF AND APPENDIX ON APPEAL TO SUPREME COURT

Sec. 1. Beginning on the first page of the brief appellant shall concisely and without repetition, under the heading "Statement of Questions Involved," state the questions involved in the appeal. Each question shall be numbered and set forth separately, in the briefest terms, and whenever possible, each question must be followed immediately by a statement as to whether the lower court answered it "Yes" or "No" or qualified it or failed to answer it, together with a statement that appellant contends that it should be answered "Yes" or "No" as the case may be. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.

The stated questions herein required shall be used in the same order as topical subheadings throughout the "argument" in appellant's brief provided for in section 3 of this rule.

APPENDIX E

BRIEF ON APPEAL—APPELLANT'S

Page i

STATEMENT OF QUESTIONS INVOLVED

Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

Appellant says "Yes."
Appellee says "No."
The Circuit Court says "No."

BIBLIOGRAPHY OF CITATIONS IN APPELLANT'S BRIEF ON APPEAL

Citation	Page
Bridwell v. Segel, 362 Mich. 102	18
Kosnicki v. Railway Co., 217 Mich. 245	17
Lavender v. Kurn, 327 U.S. 645 (90 L. Ed. 916)	20, 21
McDuffie v. Root, 300 Mich. 286	17
O'Day v. Chicago River & Indiana R. Co., 216 F. 2d 79 (CA 7)	19
Schulz v. Pennsylvania R. Co., 350 U.S. 523 (100 L. Ed. 668)	18
Congressional Act:	
Federal Employers Liability Act, 45 USC 51, et seq.	18

State of Michigan—ss. In the Supreme Court
Clerk's Office

Donald F. Winters, *Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of* the first (preliminary) page of plaintiff's brief, filed September 23, 1961 *in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.*

In Testimony Whereof, *I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 20th day of April, A.D. 1963.*

Donald F. Winters,
Clerk.

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE

RULE 8. GENERAL RULES OF PLEADING

Text of Rule

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

APPENDIX G

FEDERAL RULES OF CIVIL PROCEDURE

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

Text of Rule

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

APPENDIX H

State of Michigan—Supreme Court

Appeal from the Circuit Court for the County of St. Clair
Honorable Edward T. Kane, Circuit Judge

Frank Patzke, Jr., Plaintiff and Appellant, v. Chesapeake & Ohio Railway Company, a Virginia corporation, Defendant and Appellee.	No. 48,724

AFFIDAVIT

(Filed with this Court May 31, 1962)

Deponent, being first duly sworn, deposes and says that:

1. He is a Circuit Judge in and for the 31st Judicial Circuit, St. Clair County, Michgan;

2. He presided at the trial of the above captioned cause and was in attendance throughout the same;

3. At the conclusion of the proofs written requests to charge were submitted to the Court by counsel of both sides;

4. Due to the large number of such requests submitted and the considerable conflict between the instructions submitted by the opposing sides, the Court prepared its own instructions to the jury which were not made known to counsel of either side prior to the time that the jury was instructed;

5. Because of this circumstance it was agreed by all counsel that exceptions to the Court's instructions to the

jury could be made after they were given by the Court and after the official transcript thereof was available to counsel.

/s/ Edward T. Kane,
Circuit Judge.

Subscribed and sworn to before me this 28th day of May, A. D., 1962.

/s/ James P. Adair.
Notary Public, St. Clair County, Michigan.
My commission expires June 19, 1962.

State of Michigan—ss. In the Supreme Court
Clerk's Office

Donald F. Winters, *Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of* an affidavit signed by Edward T. Kane, Circuit Judge, filed May 31, 1962 *in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.*

In Testimony Whereof, *I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 20th day of April, A.D. 1963.*

Donald F. Winters,
Clerk.

APPENDIX I

TRIAL COURT'S ORDER GRANTING MOTION FOR NEW TRIAL

Filed June 2, 1958

At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.

Present: Honorable Edward T. Kane, Circuit Judge.

In this cause, upon reading and filing defendants' motion for a new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:

It Is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.

/s/ Edward T. Kane,
Circuit Judge

APPENDIX J

28 U.S.C.A. §2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.